No. 12374.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT L. CANNON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdictional Statement.

The appellant was indicted for failure to register under the provisions of the Selective Training and Service Act of 1948(62 Stat. 604, 50 U. S. C. App. 98). The indictment was filed January 19, 1949 [T. 2]. The District Court had jurisdiction of the cause under Title 18, Section 3231, effective September 1, 1948, which confers on the District Court original jurisdiction of all offenses against the United States.

The offense charged was committed in the County of Los Angeles, State of California [T. 2]. On the 7th day of February, 1949, the appellant appeared before the District Court for the Central Division of the Southern District of California for arraignment and plea and en-

tered a plea of not guilty [T. 3]. Thereafter the cause was tried by jury [T. 3, 27]. The appellant was found guilty of the offense charged in the indictment [T. 27, 28] and on June 9, 1949, was sentenced [T. 28, 29]. A Notice of Appeal was filed on June 10, 1949 [T. 29, 30] and the appeal perfected thereafter [T. 70, 71].

Question Involved.

Does enforced compliance with the registration provisions of the Selective Training and Service Act of 1948 violate appellant's freedom of religion under the First Amendment?

ARGUMENT.

Appellant's brief, beginning at page 7, states that there are three issues in this case. It is submitted that the first two merely reflect, and are subsidiary to, the basic issue as above stated, *i.e.,* whether enforced compliance of the registration provisions of the Selective Training and Service Act of 1948 violates freedom of religion as guaranteed by the First Amendment.

Concerning the third point claimed in appellant's brief to be an issue herein, it will appear from the instructions and rulings of the Trial Court [T. 58-60], and the position of appellee as outlined below, that appellant's religious beliefs, insofar as they caused his refusal to register, are in fact not in issue in this case. Had the Trial Court given appellant's instruction No. 14, as requested [T. 68], its position would have become inconsistent. Hence appellant's point three likewise is but a particularization of the basic issue herein involved.

This Court is no doubt aware that the case at hand represents a constitutional matter of first impression, in its being based upon the Selective Training and Service Act of 1948, and also that it is one which has not received the consideration of courts in other circuits or of the Supreme Court. Attention is invited to the case of *Richter v. United States,* No. 12282, this Court, which has been mentioned, and briefs in connection therewith quoted, in appellant's brief (pp. 9, 13-15), and which is presently before this Court for consideration. It will be noted that the issue herein involved is included in the *Richter* case, *inter alia.*

Appellant, at pages 10 and 11 of his brief, claims a presumption that legislation effecting rights under the

First Amendment is unconstitutional "whenever it encroaches on these basic rights." Whether it does so encroach is, of course, the issue in this case. In any event the rule in this regard has been accurately stated, it is submitted, in the case of *Hall v. Union Light, Heat & Power Company,* 53 Fed. Supp. 817 (1944), at pages 818, 819, where the Court stated:

> "It must be borne in mind that while the country was not at war the time this statute was enacted its purpose was for the general welfare and preparation for any eventuality. No rule of statutory construction is more readily applied by the courts than that public statutes dealing with the welfare of the whole people are to have a liberal construction. The general rule that legislators, as well as judges, must obey and support the constitution and have weighed the constitutional validity of every act they pass, giving to each statute the presumption of constitutionality, is of itself sufficient reason to sustain the validity of the act in question. I strongly adhere to the rule that every reasonable doubt must be resolved in favor of a statute and not against it and that *it should not be adjudged invalid unless its violation of the constitution is clear, complete, and unmistakable.*" (Italics supplied.)

This rule was asserted in the recent case of *National Maritime Union v. Herzog,* 78 Fed. Supp. 146 (1948), aff'd 334 U. S. 854, where there admittedly was involved a *limitation* upon rights granted under the First Amendment. There the Court examined the holding of *Board of Education v. Barnette,* 319 U. S. 624, and other precedents in this connection, and concluded that the presumption of constitutionality must be observed by it, and

that when Congress has found facts to justify the restraint on the particular individual freedom, the presumption "continues in full vigor" (p. 174).

There can be no dispute with the statements of the Supreme Court in the *Barnette* case as cited on page 10 of the appellant's brief, concerning the purpose of the Bill of Rights. But it is as well established that the rights of an individual under the First Amendment are neither absolute nor limitless. *Baxley v. United States,* 134 F. 2d 937 (C. A. 4, 1943). There Circuit Court Judge Parker, who wrote the opinion of the lower court in the *Barnette* case (*Barnette v. West Virginia Board of Education,* 47 Fed. Supp. 251, 253), is quoted to the following effect:

> "This does not mean, of course, that what a man may do or refrain from doing in the name of religious liberty is without limitations. He must render to Caesar the things that are Caesar's as well as to God the things that are God's. He may not refuse to bear arms or pay taxes because of religious scruples, nor may he engage in polygamy or any other practice directly hurtful to the safety, morals, health or general welfare of the community."

The Court in the *Baxley* case then went on to say:

> "Even clearer is it that one is criminally responsible who does an act which is prohibited by a valid criminal statute, though the one who does this act may do it under a deep and sincere religious belief that the doing of the act was not only his right but also his duty. Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244; Gilbert v. State of Minnesota, 254 U. S.

325, 41 S. Ct. 125, 65 L. Ed. 287; United States v. Macintosh, 283 U. S. 605, 51 S. Ct. 570, 75 L. Ed. 1302; City of Manchester v. Leiby, 1 Cir., 117 F. 2d 661; Rase v. United States, 6 Cir., 129 F. 2d 204."

That the depth and sincerity of one's religious belief will not excuse his violation of a valid criminal statute was likewise emphasized in the leading case of *Davis v. Beason,* 133 U. S. 333, 342 (1889).

Enforced Compliance With the Registration Provisions of the Selective Training and Service Act of 1948 Does Not Violate Appellant's Freedom of Religion Under the First Amendment.

It is clear that Congress has the power to raise a peacetime army by conscription. *United States v. Herling,* 120 F. 2d 236 (C. A. 2, 1941), and authorities cited therein; *United States v. Cornell,* 36 Fed. Supp. 81. That it has the concomitant constitutional power to request registration of male citizens during peacetime, as under the Selective Training and Service Act of 1948, is equally clear; and the authorities abundantly show that the exercise of such power does not constitute an abridgement of the freedoom of religion of any person. In *Local Draft Board No. 1 v. Connors,* 124 F. 2d 388 (C. A. 9, 1941), the Court held:

> "It is within the congressional power to call everyone to the colors. No one under the jurisdiction of the sovereign nation, whatever his or her status, is exempt except by the grace of the government."

Since it is within the power of Congress to call everyone to the colors without exemption, there is no basis in reason or policy for this Court to hold that Congress does

not have the power to require that its male citizens merely register without exemption under the Selective Training and Service Act of 1948. In *United States v. Rappeport,* 36 Fed. Supp. 915, the Court held:

> "Accordingly Congress undoubtedly has the power to seek information through registration or otherwise in peacetime in order to be prepared for the intelligent exercise of its power to raise armies by conscription * * *"

See, also, *Stone v. Christensen,* 36 Fed. Supp. 739 (1940), at 743, where the provisions of the Selective Training and Service Act of 1940, for peacetime registration, were held to be constitutional. The Court stated succinctly:

> "In this present period, the wars undeclared under the law of nations, the disregard of international convention, the hostile concentrations cloaked by manifestos of pacific intention, the elimination of time and distance as ponderable factors, the lightning strokes of modern arms are actualities over which the words 'at peace' cannot be permitted to tyrannize in making judgments. * * * but whether events prove we are at war, in a state of war, or clinging to an equivocal neutrality, *a failure to register manpower of the country would be a failure to provide for 'the common defense.'"* (Italics supplied.)

In *United States v. Lambert, supra,* 123 F. 2d 395 (C. A. 3, 1941), the Court held that the power of Congress to compel registration for military service and training is not limited to actions taken after a formal declaration of war.

In *United States v. Brooks,* 54 Fed. Supp. 995 (1944), at page 996, the Court made the following comment:

> "Respect for the integrity of conscience is unquestionably firmly embedded in our constitutional foundations. Reason finds it difficult to comprehend the appeal for the shelter of the Constitution by one who is unwilling to defend the Constitution. Logic looks askance at one who, asserting his right to freedom of religion, refuses to have any share in resisting an enemy who has declared war upon us and whose first act in every land he had invaded has been to abolish freedom of religion."

The Court went on to quote from *West Virginia Board of Education v. Barnette, supra,* 319 U. S. 624, as follows:

> "No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are * * * imperatively necessary to protect society as a whole from grave and pressingly imminent dangers. * * *"

At this point it is worthwhile to set out again the words of the late Mr. Justice Cardozo in the case of *Hamilton v. Regents,* 293 U. S. 245, at pages 267-268, as quoted by the Trial Court in its instruction No. 14-A [T. 60, 61]:

> "Never in our history has the notion been accepted, or even, it is believed, advanced, that acts * * * indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state. * * *

Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as immoral. The right of private judgment has never yet been exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law."

See, also:

In re Summers, 325 U. S. 561, 571 (1945);

United States v. Moriarity, 106 Fed. 886, 891-892 (Cir. Ct., N. Y., 1901).

In *Hopper v. United States,* 142 F. 2d 181 (C. A. 9, 1943), the Court commented:

"A few points remain to be noticed. Appellant attacks the Selective Service Act as unconstitutional on the ground that it prohibits the free exercise of religion, deprives appellant of liberty and property without due process, and condemns him to involuntary servitude not as punishment for crime. Also that the Act delegates legislative powers. These propositions, in one guise or another, have been advanced again and again, both in this and in the first World War, and have uniformly met with rejection. Selective Draft Law Cases (Arver v. United States), 245 U. S. 366, 38 S. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856."

In *Bronemann v. United States,* 138 F. 2d 333 (C. A. 8, 1943), it was held:

> "For the whole class of persons the procedure set up by the Act provides to the individual the full protection of due process of law throughout the proceedings by which his general liability to military service becomes a fixed obligation through his selection and induction into such service."

Further, in *Rase v. United States,* 129 F. 2d 204 (C. A. 6, 1942), the Court stated:

> "The Constitution grants no immunity from military service because of religious convictions or activities. Immunity arises solely through Congressional grace in pursuance of a traditional American policy of deference to conscientious objection and Holy calling."

In *United States v. Newman,* 44 Fed. Supp. 817 (1942), it was again held:

> "The grant of exemption to conscientious objectors is not a matter of constitutional right but wholly an act of grace upon the part of Congress."

Appellant in his brief (p. 12) explicitly raises for the first time the claim that there is no "clear and present danger" warranting denial of his constitutional rights, in the sense of requiring one of his religious beliefs to register for conscription. Apparently appellant misapprehends the nature of the power on which the raising of an army by conscription is based. Clearly the doctrine of "clear and present danger" has no bearing upon the assertion of a power explicitly granted, in the Constitution, to Congress. "It may be taken as settled that the power of Congress to raise and support armies conferred in Article

I, Section 8, of the Constitution may be implemented by legislation providing for compulsory service." *United States v. Lambert, supra,* 123 F. 2d 395, which as above indicated also upheld as constitutional the concomitant power to require registration. The cases above cited as dealing with constitutionality of conscription acts and registration provisions thereunder clearly base their holding upon the explicit grant to Congress, in Article I, Section 8 of the Constitution, of the power to raise armies, and to "provide for the common defense" as contained in the Preamble of the Constitution.

This is also made amply clear in the cases of *United States v. Schwimmer,* 279 U. S. 644 (1929), and *United States v. McIntosh,* 283 U. S. 605 (1931), wherein it is emphasized by the court that Congress does have the constitutional power to exact military duty from all alike, and that only by virtue of tradition and liberal attitude have those whose religious convictions forbid performing military service been excused. The cases of *Stone v. Christensen, supra,* 36 Fed. Supp. 739, and *United States v. Rappeport, supra,* 36 F. 2d 915, again clarify this point in regard to the Selective Training and Service Act of 1940.

It appears then that the criterion is not one of "clear and present danger" but rather, one of "need". The former doctrine, as substantiated by the cases cited in appellant's brief (pp. 11, 12), is one concerned with dealing with a threat to the safety, morals, health or general welfare of the community. *Baxley v. United States, supra,* 134 F. 2d 937. The latter is concerned with emergencies

causing need for the use of expressed powers granted to Congress by the Constitution. In this regard the *Stone* case had the following to say:

> " 'Emergency does not create power.' The decision of the Supreme Court above cited cannot be justified solely then upon the basis that war existed. But facts which create emergencies lay foundation for the use of express powers, the exercise of which could not be otherwise justified. Congress, in possession of the facts and no less than the courts restrained by the obligation to support and maintain the federal Constitution, passed the act requiring registration. In the light of all the circumstances in dealing with registration alone, 'There is no occasion at this time to mark the limits of governmental power in the exaction of military service when the nation is at peace.' "

See, also, *Van Bibber v. United States, supra,* 151 F. 2d 444, where it is stated at page 446:

> "Appellant is mistaken in thinking that the Constitution exempts anyone from serving his country in some essential capacity or other *in a time of need.*" (Italics supplied.)

In *United States v. Herling, supra,* 120 F. 2d 236, referring to the Selective Training and Service Act of 1940, enacted in peacetime, the Court said:

> "* * * There was no reason for a continuance to procure evidence as to an emergency *vel non,* since that was irrelevant to the validity of the law * * *."

Thus it is apparent that the passage of a conscription act involves the exaction by Congress of a *duty owed by all citizens,* and not the *limiting* of individual rights

granted to the citizens under the First Amendment. In other words the liability to military service is a constitutionally created obligation of all citizens, co-extensive with the individual rights granted to them in the same instrument. The army power, when exerted, is complete and dominant to the extent of its exertion, *Selective Draft Law Cases,* 245 U. S. 366 (1917).

In his brief appellant raises the point that if the registration requirement be regarded as a means of obtaining statistical matter pertaining to male citizens eligible for draft, that end has been met by the defendant's voluntarily giving to his draft board his name, age and residence and "the further information that his conscience did not permit him to register." (Appellant's Brief, p. 13.) In this connection regulations propounded under the Selective Training and Service Act of 1948 are quoted to the effect that the registrar of the local draft board must register on behalf of one who himself refuses to register (pp. 13-15).

It is of course a widely accepted rule that normally matters not raised before the Trial Court may not be raised on appeal. See *Alberty v. United States,* 91 F. 2d 461 (Cal. App. 9, 1937); *Breedin v. United States,* 73 F. 2d 778 (Cal. App. 4, 1934). The last mentioned point was not brought before the Trial Court for consideration, and hence has been improperly raised.

In any event it would appear too plain to require extensive argument that one may not excuse his own violation of a valid criminal law on the ground that another is required by the same law to perform a duty resultant of such violation. In its instructions to the jury the Trial Court stated what was the law to have been observed by the appellant [T. 57, 58]. This law and regulations pro-

pounded thereunder require that the *appellant* register, and the sole issue in this case has been whether or not *he* did so register. Patently it would be folly to allow one subject to the terms of the act in question to observe it in the manner he sees fit. A similar point was raised by the appellant in *VanBibber v. United States, supra,* 151 F. 2d 444, where the said appellant had arbitrarily taken the position that he had already furnished ample evidence of his status to his local board and could not be required by it to do more to entitle him to a vindication of his rights, and that his conscience would not permit him to submit further to any machinery or processes of the Selective Service System. Answering this, and clearly articulating the relationship between the Congressional power to raise an army and individual rights under the First Amendment, the Court stated, at pages 446, 447:

> "And the guarantee of the First Amendment of free exercise of religion, which appellant invokes, does not allow him or any other citizen to make his own rules or select his own methods for vindication of any rights to which he may be entitled under the Selective Training and Service Act or as a matter of religious freedom in general. It is only a guarantee that the law will protect his free exercise of religion through adequate, orderly and reasonable machinery and processes. No citizen who refuses to recognize and resort to such machinery and processes as the law has appropriately prescribed for that purpose can or will be heard to complain that his religious freedom has not been respected. Such a recognition of and submission to reasonable machinery and process are of the essence of the functioning of a democratic form of government and of its power to vindicate personal rights. That lesson no American citizen may refuse to learn."

The purposes for which the Selective Service authorities may or may not find it necessary to register on behalf of one who himself refuses to do so, insofar as possible, are clearly not in issue here.

Conclusion.

In conclusion it is respectfully submitted that enforced compliance with the registration provisions of the Selective Training and Service Act of 1948 does not violate appellant's freedom of religion under the First Amendment, and consequently that the Trial Court did not err when it gave instruction 14-A [T. 6], and when it refused to give appellant's instructions No. 14 and No. 15 [T. 68].

Respectfully submitted,

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